YANG LAK MAN *a*

v.

YANG PAW MAN

HIGH COURT MALAYA, TEMERLOH *b*
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: 24-30-1999]
26 JULY 1999

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating summons - Whether admissible - Rules of the High Court 1980, O. 41 r. 1* *c*

This was an application by the plaintiff by way of an originating summons seeking an order for the defendant to deliver to him the issue document of title of a piece of land in which the plaintiff was a co-proprietor, so as to enable him to transfer his share in the said land to his son. The originating summons was supported by an affidavit affirmed on 8 February 1999. Both the said affidavit and the originating summons were then filed in court on 1 March 1999. *d*

At the commencement of the hearing of the said originating summons, the defendant raised a preliminary objection that the affidavit was defective because it was affirmed before the filing of the originating summons. The defendant contended that the supporting affidavit could only be affirmed after the filing of the originating summons was filed in court and relied on O. 41 r. 1(1) and (2) of the Rules of the High Court 1980. He therefore argued that the said affidavit should be disallowed. *e* *f*

On the other hand, the plaintiff contended that the said supporting affidavit was proper although it was affirmed earlier than the date of filing of the originating summons. He argued that what was important was that the supporting affidavit should be filed together with the originating summons and that was done in the present case. *g*

Held:

[1] To insist that a supporting affidavit be affirmed after the filing of the originating summons, would not only be contrary to established contemporary legal practice but would also cause unnecessary confusion and hardship to litigants. *h*

[Preliminary objection overruled.]

i

Case(s) referred to:
Arab-Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor [1999] 6 CLJ 405
Ban Hin Lee Bank v. Pang Lai Hin [1999] 2 MLJ 234
Hongkong Bank (M) Bhd v. Nor Harizan Mohd Ali [1999] 6 CLJ 466

Legislation referred to:
Rules of the High Court 1980, O. 6 r. 6(3), O. 7 r. 5, O. 41 r. 1, (1), (2)

For the plaintiff - KC Wai; M/s KC Wai & Assoc
For the defendant - Richard Bong; M/s Bong & Co

Reported by VT Singam

JUDGMENT

Hishamudin Yunus J:

This originating summons (encl. 4) is an application by the plaintiff for an order that the defendant do deliver to him the issue document of title of a piece of land, in respect of which the plaintiff is a co-proprietor, so as to enable him to transfer his share in the land to his son.

This application is supported by an affidavit (encl. 3) affirmed by one Hong Tuai King on 8 February 1999. This supporting affidavit together with the originating summons (encl. 4) was filed in court 1 March 1999.

At the commencement of the hearing of this originating summons, the learned counsel for the defendant, Encik Richard Bong, raises a preliminary objection. The objection taken is against the supporting affidavit (encl. 3). It is contended by Encik Bong that the affidavit is defective and should be disallowed. The learned counsel argues that the affidavit is defective because it was affirmed **before** the originating summons was filed. According to Encik Bong, the supporting affidavit could only be affirmed **after** the originating summons has been filed in court.

Encik Bong relies on O. 41 r. 1(1) and (2) of the Rules of the High Court ('RHC'), which stipulates –

> (1) Subject to paras. (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.
>
> (2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words 'and other matters', and where a cause or matter is entitled in matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.

Ban Hin Lee Bank v. Pang Lai Hin [1999] 2 MLJ 234 was cited in support of the contention. In this case cited, the supporting affidavit was affirmed on 22 June whereas the originating summons was filed on 24 June. Kamalanathan Ratnam J was of the view that the affidavit should be disallowed. The learned judge based his decision on a previous decision of his in *Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor* [1999] 1 AMR 118. In the latter case, the affidavit was affirmed one week before the originating summons was filed. The learned judge, referring to O. 41 r. 1 of the RHC, disallowed the affidavit on the grounds that (to quote what was said, at p. 240 E-F):

> In other words, an affidavit affirmed in a cause or matter must be intituled in that cause or matter. For a cause or matter to be properly entitled or intituled, the case number relating to that cause or matter is vital factor that must be present ... the said affidavit cannot be said to have been affirmed in a cause or matter because, properly speaking, there was no cause or matter that had been registered at the Registry.

The learned judge went on to hold –

> ... in the present case, where the affidavit forms the evidence on which the application is to be launched, and if the affidavit has not been affirmed in an existing cause or matter, then the filing of such an affidavit cannot be treated as an irregularity that can be cured. In my view, it is a nullity as it supports a non-existent cause or matter.

Encik KC Wai for the plaintiff, on the other hand, maintains that the supporting affidavit is proper, although it was affirmed earlier than the filing of the originating summons. He maintains that what is important is that the supporting affidavit should be filed together with the originating summons as was duly done in the present case. In support of his argument, he cites *Hongkong Bank (M) Bhd v. Nor Harizan bte Mohd Ali* [1999] 6 CLJ 466; [1995] 5 MLJ 629. There, Azhar J took a view different from that of Kamalanathan Ratnam J in *Ban Hin Lee Bank*. The learned judge held:

> Swearing of an affidavit that bears no registration number of the case as the originating process has not begun does not violate any provision of the law as it stands. To hold otherwise would undoubtedly result in grave hardship and unnecessary inconvenience to the parties concerned.

With respect, I share the view as expressed by the learned judge in *Hongkong Bank*. On my part, I have nothing more to add to what has been expressed by Azhar J except just to stress that, having scrutinised O. 41 r. 1(1) and (2), I simply fail to see in what way it could justifiably be said that the said provisions, either expressly or by implication, require the affirming of a supporting affidavit to be done only **after** the originating summons has been filed and not before. It is, I concede, true that an affidavit affirmed **before**

the originating summons is filed would not carry the originating summons serial number as yet. But then this omission, at the time of the affirmation, is understandable and should not, in my mind, be a matter of grave concern. For the serial number would in due course (when the originating summons together with the supporting affidavit are filed in court), partly as a matter of procedural law (O. 6 r. 6(3) read together with O. 7 r. 5 of the RHC), and partly as a matter of hitherto accepted practice, be given by the Registrar and thereafter inserted by the relevant officer of the court in the title (as a matter of practice, at the time of filing, the reference to the serial number to the title would be left blank in the from "Originating Summons No ...") of both the originating summons as well as the supporting affidavit.

Another thing that I wish to add is that, in my humble view, it is unfair to overemphasise the importance of the serial number of a supporting affidavit in respect of a **nascent** (that is, a pre-presented) originating summons. The serial number, as we are all aware, is only one of the components or parts of the title of the action. There are other equally important components of the title, that is, the name of the High Court where the action is filed, the name of the parties to the action, and the subject matter of the action (expressed in the from of "In the matter of ..."), as illustrated by Azhar J (at p. 633 line A-E) in *Hongkong Bank*.

Finally, I share the sentiment as expressed by the learned judge in *Hongkong Bank* that, to insist that a supporting affidavit for an originating summons be affirmed only after the originating summons has been filed in court, would be not only contrary to established contemporary legal practice but would also cause unnecessary confusion and hardship to litigants.

Accordingly, the preliminary objection is overruled.